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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

999 18th STREET—SUITE 500

DENVER, COLORADO 80202-2405

FEB 05 1987

Ref: 8RC

Ms. Catherine Orr
Legal Division
Department of Health
and Environmental Sciences
State of Montana
Cogswell Building
Helena, Montana 59620

Dear Catherine:

I have enclosed a signed version of the Memorandum of Agreement ("MOA") addressing confidentiality which corrects a citation error. See Frank Crowley for an explanation. I currently plan on a training session on the MOA in February or March. I will be in touch with you to arrange for your participation. Thanks for your help on the MOA!

Sincerely,

Rex Callaway, Attorney
Office of Regional Counsel

Enclosure

cc: John Wardell

ENVIRONMENTAL PROTECTION
AGENCY

FEB 9 1987

MONTANA OFFICE

Carol Lane
To Dan
lost 600
made for
Dan
RPM
Dan
John

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement ("Agreement") is entered into between the United States Environmental Protection Agency ("EPA") Region VIII and the Department of Health and Environmental Sciences of the State of Montana (the "State"). This Agreement establishes a procedure by which documents may be exchanged or viewed between EPA and the State in the context of remedial, enforcement, and natural resource damage actions pursued by the State or EPA under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 et seq. All references below to sections of CERCLA shall be deemed to include original language of CERCLA and, where applicable, the provisions of the Superfund Amendments and Reauthorization Act ("SARA") of 1986.

I. PURPOSES

The purposes of this Agreement are to:

1) Provide a mechanism for review and/or exchange of documents associated with remedial, enforcement, and natural resource damage actions pursued by EPA or the State under CERCLA, including actions undertaken by EPA or the State pursuant to cooperative agreements executed by the parties pursuant to section 104(d) of CERCLA, 42 U.S.C. § 9604(d).

2) Establish procedures for close cooperation and consultation between the parties in order to make optimal use of the parties' resources and to avoid possible conflicts and duplication of effort.

3) Provide for the review and/or exchange of technical information, reports, studies, or other pertinent materials regarding the sites in a manner that will ensure the protection of the confidential status of enforcement related and other privileged information.

II. SCOPE

This Agreement covers documents obtained or prepared in anticipation of CERCLA enforcement actions or hazardous substance cleanups at all existing and future sites in Montana which are subject to CERCLA.

III. EXCHANGE OF INFORMATION

Except when disclosure is prohibited by law or when necessary to protect a privilege in any ongoing or potential litigation, the parties agree, upon request, to exchange or make available for review in accordance with the procedures in paragraph 4 of this Agreement when applicable or through another mutually established method, all data, analyses, summaries, reports, studies, documents, or other pertinent information, materials, or evaluations received or prepared by the parties or their contractors or obtained from the potentially responsible parties for any of the sites

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referred to above. The parties shall promptly inform each other of the availability of such records. Consultation regarding the existence of documents may be established at regular intervals.

In the event that records are exchanged or reviewed which are privileged or exempt from mandatory disclosure under applicable Federal or State law, the parties agree that such records are being exchanged or reviewed to further: 1) the purposes of this Agreement; 2) the enforcement objectives set out under CERCLA and this Agreement; and 3) the common interest of the parties in the protection of the public health, welfare, and protection of the environment or recoupment for loss of natural resources at existing or future CERCLA sites. The parties will take all steps necessary to ensure that such information is kept confidential consistent with 40 C.F.R. Part 2 and other applicable State and Federal requirements, including those set forth in paragraph 4 of this Agreement. Both parties agree to protect each other's claims for confidentiality and exemptions to public release requirements of such exchanged information, particularly with regard to records related to potential or ongoing enforcement actions. By entering into this Agreement, neither party intends to waive any privileges or claims for exemptions from record release requirements which it may assert against third parties.

The State and/or EPA will consult prior to the release of any records generated by the other party to a third party and will not release such records without the other party's consent, except as required by law. The relevant State project officer or his designee shall be primarily responsible for ensuring these consultations occur with the relevant EPA project officer or his designee.

Within sixty (60) days of the effective date of this Agreement, EPA shall provide a training course for State and EPA personnel concerning implementation of this Agreement. This training course shall have as its objectives:

- a. Training of State and EPA personnel in categorizing enforcement-related information under the procedures in this Agreement.
- b. Training of State and EPA personnel in procedures for handling confidential information.
- c. Training of State and EPA personnel and contractors in preparation of documents in a manner that minimizes the amount of enforcement confidential information in documents.

IV. CLASSIFICATION OF INFORMATION

All documents prepared by EPA and State staff or contractors which are deemed useful to the State in carrying out the State's responsibilities under cooperative agreements shall be reviewed by EPA and State project officers prior to exchange between the parties in order to evaluate the degree of enforcement sensitivity of each document and for characterization into one of three categories. The project officers shall consult their respective legal counsels in evaluating the degree of enforcement

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sensitivity. When a document has been assigned to a category, the State and EPA shall follow the procedures set forth below for that category.

Category One

This category includes enforcement confidential, internal legal, strategy, and pre-decisional documents. Examples include draft and final PRP reports, enforcement strategies, settlement analyses, legal opinions, certain pre-decisional documents or memoranda, and attorney-client communications and attorney work products which EPA deems appropriate to allow the State to examine. These documents shall be made available at the EPA Montana Office for perusal by State Department of Health and Environmental Sciences staff. Such documents in this category may not be copied, memorialized in writing, or removed from the EPA Montana Office by State employees.

Category Two

- a. This category includes enforcement confidential documents that must be made available to the State to facilitate State administration of State-lead cooperative agreement technical responsibilities. Examples are EPA technical comments on draft State workplans, Remedial Investigation reports and Feasibility Study reports and, when appropriate, draft EPA technical documents from other sites.

Such documents, while "enforcement confidential" and either privileged or otherwise subject to discretionary withholding by EPA under the Freedom of Information Act, may be provided to the State under certain restrictions specified on a case-by-case basis. Prior to obtaining documents in this category, the State must assure that such restrictions will be followed. The State shall return all such records to EPA within 2 weeks of receipt and shall not copy the documents unless otherwise agreed. The State and its contractors shall maintain such documents in a secure, locked file when not in use.

- b. The State shall undertake whatever steps that may be necessary to maintain the confidential status of documents identified below originating within the State which were prepared for the purpose of complying with cooperative agreements under section 104(c)(3) of CERCLA or ensuring an appropriate response action of a potentially responsible party under sections 104, 106, or 107 of CERCLA.

These documents include draft technical memoranda, draft Remedial Investigation reports, draft public health evaluations, draft Feasibility Study reports, draft endangerment assessments, draft Records of Decision/Enforcement Decision Documents, briefing papers, and correspondence between legal staffs, as well as documents determined to fall into this category by EPA on a case-by-case basis.

The State project officer shall consult with the EPA project officer prior to releasing such documents to third parties. EPA and State legal counsel shall also be consulted. Unless otherwise agreed by EPA, the State shall deny requests for such documents by third parties.

The State shall maintain such documents in a secure, locked file when not in use.

Category Three

This category of documents, containing "general information" or non-sensitive enforcement-related information originated by EPA, may be determined by EPA and State counsel to be openly available to the State and the public on the basis that the information is disclosable under the Federal Freedom of Information Act ("FOIA").

V. MODIFICATION OF AGREEMENT

In the event of any change in the law or regulations upon which the terms and conditions of this Agreement are based, or any other circumstances necessitating a modification to this Agreement, and if approved by both parties, the parties may make such written modifications as are appropriate.

VI. LIABILITY

Nothing contained in this Agreement shall be construed to create, either expressly or by implication, the relationship of agency between EPA and the State. And standards, procedures, or protocols prescribed in this Agreement to be followed by the State during the performance of its obligations under this Agreement do not constitute a right of the EPA to control the actions of the State. EPA (including its employees and contractors) is not authorized to represent or act on behalf of the State in any matter related to the subject matter of this Agreement. Neither EPA nor the State shall be liable for the contracts, acts, errors, or omissions, or the agents, employees, or contractors of the other party entered into, committed, or performed with respect to or in the performance of this Agreement.

This Agreement shall not in any way release any persons or entities from liability with respect to the sites nor affect recovery of costs against such persons or entities.

The effective date of this Agreement is:

20 January 1987

MONTANA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL SCIENCES

By:

John J. Drynan, M.D.
John J. Drynan, M.D. Director

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ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

By: Alexandra B. Smith
John G. Welles for
Regional Administrator